Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable	)	
Communications Policy Act of 1984 as amended	)	MB Docket No. 05-311
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	

COMMENTS OF

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Daniel L. Brenner
Neal M. Goldberg
National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

April 20, 2007

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	))))))	MB Docket No. 05-311

COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits its comments on the *Further Notice of Proposed Rulemaking* ("*Further Notice*") in the above-captioned proceeding.[1] NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation's cable television subscribers, as well as more than 200 cable programming networks and services. NCTA's members also include suppliers of equipment and services to the cable industry. The cable industry is also the nation's largest broadband provider of high speed Internet access after investing $100 billion over ten years to build out a two-way interactive network with fiber optic technology.

1 *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, rel. Mar. 5, 2007 ("*Report and Order*" or "*Further Notice*").

INTRODUCTION AND SUMMARY

In this proceeding, the Commission's *Report and Order* purports to implement Section 621(a)(1) of the Communications Act. That provision states that a franchising authority "may not unreasonably refuse to award an additional competitive franchise" and that "[a]ny applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of Section 635" of the Act in federal or state court.[2] Despite the significant questions raised about the Commission's authority to take *any* action under Section 621, in the *Report and Order* it adopted rules and provided "guidance" for determining what is an "unreasonable" refusal to award a franchise. As discussed in more detail below, the Commission's actions addressed five general areas – (1) The Time Frame for Franchise Negotiations; (2) Build-Out Requirements; (3) The Definition and Computation of Franchise Fees; (4) PEG and Institutional Network ("I-Net") Requirements; and (5) Regulation of "Mixed-Use Networks."

In addition, the Commission has tentatively concluded that its "findings" in the *Report and Order* regarding the restrictions it has adopted on what franchising authorities may insist upon in granting new franchises should also apply to existing cable operators – although not until they negotiate franchise renewals. In the *Further Notice* the Commission seeks comments on that tentative conclusion among other things. The *Further Notice* provides that the Commission will decide these matters and release an order within six months of the release date of the *Report and Order* (*i.e.*, by September 5, 2007).

We continue to believe that the Commission did not have an adequate factual basis to reach the conclusions it did as to whether telephone companies needed relief from local

[2] 47 U.S.C. § 541(a)(1).

franchising obligations.[3] Moreover, as we and others demonstrated, the Commission did not have the authority to adopt rules or provide "guidance" affecting the franchise process under Section 621(a)(1).[4]

We leave for another forum and another day the question of whether the Commission had an adequate record and the legal authority to take the actions it did in the *Report and Order,* particularly with respect to imposing a deadline ("shot clock") on franchise negotiations and restrictions on build-out requirements. As noted, NCTA and others demonstrated that nothing in Section 621 or other provisions of the Act specifically directs the Commission to adopt rules or otherwise implement the prohibition in Section 621(a)(1) that "a franchising authority . . . may not unreasonably refuse to award an additional competitive franchise." So, to the extent the Commission took actions pursuant to that provision, particularly with respect to the "shot clock" and "build-out" requirements, they are legally suspect, and, indeed, have been appealed.[5]

However, in dealing with other issues raised in this proceeding, the Commission purported to act pursuant to Section 621(a)(1) when in fact it was addressing other statutory provisions which apply to *all* cable operators. For example, in claiming to reach conclusions regarding what franchise fees are "unreasonable" under Section 621(a)(1), the Commission essentially interpreted and clarified the term "franchise fee" as defined in Section 622 of the Act, performing a role which it has done in the past with respect to the definition and computation of

---

3 *See* Comments of the National Cable & Telecommunications Association, MB Docket No. 05-311, filed Feb. 13, 2006, at 5-12 ("NCTA Comments"); Reply Comments of the National Cable & Telecommunications Association, MB Docket No. 05-311, filed Mar. 28, 2006, at 3-9 ("NCTA Reply Comments").

4 *See e.g.*, NCTA Comments at 19-29; NCTA Reply Comments at 9-24; Letter from Daniel K. Alvarez, Counsel for Comcast Corporation, MB Docket No. 05-311, filed Dec. 11, 2006.

5 Parties have sought judicial review of the *Report and Order* in a variety of federal circuits. *See Communications Daily*, April 5, 2007, at 10 (petitions for review filed in six circuits). These appeals have been consolidated in the United States Court of Appeals for the Sixth Circuit. *Communications Daily*, Apr. 12, 2007 at 7.

fees under that section. The resulting definitions or clarifications of the term "franchise fees" under Section 622 apply immediately to all cable operators.

Similarly, in purporting to determine "reasonable" requirements for PEG channels and institutional networks under Section 621(a)(1), the Commission essentially has clarified the permissible requirements under Section 611(a) of the Act, which places limits on the authority of local franchising authorities to establish channel capacity requirements for PEG channels and requirements for institutional networks. These clarifications of Section 611 requirements also must apply immediately to all cable operators subject to those requirements.[6] As the Commission said in the *Further Notice*, Section 622(a) and Section 611 "*do not distinguish between incumbents and new entrants or franchises issued to incumbents versus franchises issued to new entrants*."[7]

Finally, the Commission's "clarification" of what authority LFAs have over "mixed-use" facilities is, at bottom, an interpretation of other provisions of the Act including the definition of "cable system" under Section 602(7) of the Act which apply equally to existing cable operators and new entrants alike.

In each of these areas, the Commission purported to act pursuant to Section 621(a)(1) despite the lack of FCC authority to take any action under that section, In fact, the Commission was merely restating or clarifying existing law under Sections 622 (franchise fees), 611 (PEG/I-Nets), or 602(7) ("cable system" definitions) – provisions which apply equally to existing and prospective cable operators. As we said in our Comments in this proceeding, "[t]he FCC

6 To the extent the Commission claimed to interpret the term "adequate" PEG requirements in Section 621(a)(4), that provision is independent of Section 621(a)(1) and applies to all franchise holders.

7 *Report and Order* at ¶ 140 (emphasis added)

unquestionably has authority to interpret the definitions of the Act."[8] And when it does so, the resulting interpretations apply to all cable operators immediately.

Even if this result were not required by law, sound public policy and Commission precedent also support such an approach. As we said in our Comments:

> [R]egulating like services alike is both reasonable and pro-competitive. Indeed, imposing regulatory requirements on one competitor but not on another is more likely to distort the competitive marketplace. It results in winners and losers being chosen on the basis of regulatory disparities rather than on the basis of who can best and most efficiently meet consumer demand.[9]

More recently, the Commission noted the importance of regulatory parity when it ruled that wireless broadband services should be treated as Title I information services.[10] As Chairman Martin said, "all providers of the same service should be treated in the same manner regardless of the technology that they employ."[11]

I. THE REPORT AND ORDER

In our comments in this proceeding we demonstrated that there is no evidence in the record that local franchising authorities are refusing to award competitive franchises, and that telephone companies seeking such franchises are able to obtain them without delay. More significantly, we showed that the Commission has neither the authority to relieve telephone companies of obligations under Title VI of the Act nor to implement Section 621(a)(1) which provides for judicial – not FCC – enforcement of its terms. Nevertheless, contrary to the record evidence and the Communications Act mandates, the Commission adopted rules and issued

[8] NCTA Comments at n. 45.

[9] *Id.* at 3.

[10] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, FCC 07-30, WT Docket No 07-53 (rel. March 23, 2007).

[11] *Id.*, Separate Statement of Chairman Martin.

policy "guidance" providing franchise relief for telephone companies and other new entrants purportedly pursuant to Section 621(a)(1).

Despite the fact that Section 621 gives the FCC no role in its implementation, in the *Report and Order,* the Commission asserted broad authority to interpret, implement and enforce that provision. Claiming to act pursuant to Section 621(a)(1), the Commission imposed certain rules and restrictions on local franchising authorities to prohibit them from unreasonably delaying action on competitive franchise applications or imposing "unreasonable regulatory roadblocks" on competitive franchise applicants. In particular, the Commission took the following actions:

- **Franchise Negotiation Time Frame**. The *Report and Order* imposes a 90-day time limit on franchising authority consideration of franchise applications from entities that already use the public rights-of-way (*i.e.*, phone companies), and a six-month limit for applications from other new franchise applicants.[12]

- **Build-Out Requirements.** The *Report and Order* states that build-out requirements can, in some cases, be unreasonable, and that franchising authorities are prohibited from refusing to award a competitive franchise because the applicant will not agree to unreasonable build-out requirements.[13] The Commission identifies a number of build-out conditions that would "seem" to be unreasonable,[14] but it does not specifically hold that any

[12] *Report and Order* at ¶¶ 66-81. The clock starts running when the applicant first files whatever is required by state or local laws or regulations for franchise applications, so long as the application includes certain specified information, such as the area to be served, the proposed term of the agreement, the proposed franchise fee, and the proposed PEG access capacity and capital support to be provided. If a franchising authority does not act within the time limits, the application will be deemed temporarily granted, on the terms proposed by the applicant, until the franchising authority either grants a franchise or denies it. If the franchising authority subsequently grants a franchise, the terms of the agreement will supersede the temporary terms of the application. If it denies the franchise, the applicant can then appeal the denial in court.

[13] *Id*. at ¶¶ 82-93.

[14] These include, absent other factors, requiring the new entrant to serve everyone in a franchise area before it has begun providing service to anyone; requiring facilities-based entrants (*e.g.*, telephone companies) to build out beyond the footprint of their existing facilities before they have begun providing cable service; requiring more of a new entrant than was required of an existing cable operator; requiring the new entrant to build out and provide service to buildings or developments to which the new entrant cannot obtain access on reasonable terms; requiring the new entrant to build out to certain areas or customers that the entrant cannot reach using standard technical solutions; and requiring the new entrant to build out and provide service to areas where it cannot obtain reasonable access to and use of the public rights-of-way. *Id*. at ¶¶ 89-90.

particular build-out requirements *are* always unreasonable (except that "[s]ubjecting a competitive applicant to more stringent build-out requirements than the LFA placed on the incumbent cable operator is unreasonable.")[15]

- **Franchise Fees.** The *Report and Order* clarifies certain questions regarding how the 5% franchise fee cap is calculated and what fees and payments are considered "franchise fees" subject to the cap. As we discuss below, these clarifications are interpretations of Section 622, the franchise fee provisions of the Act, but the *Report and Order* suggests that they only apply, for now, to *new* franchisees.[16]

- **PEG/Institutional Networks.** The *Report and Order* imposes limitations on the extent to which franchising authorities may insist upon PEG access and I-Net facilities and services in awarding additional franchises. Among other things, it concludes that insisting on "completely duplicative" PEG and I-Net requirements would be unreasonable.[17]

- **Mixed Use Networks.** The *Report and Order* provides some clarifications regarding the extent to which a cable franchising authority may regulate facilities and services used to provide services other than cable service.[18]

These last three findings are particularly relevant to the *Further Notice*. The Commission tentatively concludes that these findings should be applicable to existing operators when their current franchises are renewed. As discussed below, however, these findings are applicable immediately to all cable operators.

II. THE COMMISSION'S CLARIFICATION OF STATUTORY TERMS APPLIES TO ALL CABLE OPERATORS SUBJECT TO THOSE TERMS

In the *Further Notice,* the Commission seeks comment on its tentative conclusion that the "findings" in the *Report and Order* "should apply to cable operators that have existing franchise

15 *Id.* at 90. The *Report and Order* and the accompanying rules do not appear to give the Commission any further role in determining whether a particular build-out requirement is unreasonable. What it does expressly hold is that cities do not have "unlimited local flexibility" to impose build-out requirements. *Id.* at ¶ 37.

16 *Id.* at ¶¶ 94-108. In the *Further Notice*, the Commission has proposed extending these "findings" to existing franchisees, but not until their franchises are renewed.

17 *Id*. at ¶¶ 110-120.

18 *Id*. at ¶¶ 121-124.

agreements as they negotiate renewal of those agreements with LFAs."[19] It also seeks comment on its authority to implement its tentative conclusion. As we show below, with respect to its determinations on franchise fees, PEG/I-Net requirements and "mixed-use" facilities, the Commission merely restated existing law or clarified provisions in Title VI. As such, its "findings" are equally applicable to existing operators and new entrants and apply immediately to both. There is nothing in the statute that suggests that an existing operator must wait until renewal time to gain the benefit of such rulings.

Moreover, applying those "findings" to existing cable operators immediately is consistent with the purposes of Title VI, as established by Congress in Section 601 of the Act. In particular, Congress intended through Title VI to "establish a *national* policy concerning cable communications," with "franchise procedures and standards which encourage the growth and development of cable systems." 47 U.S.C. §§ 521(1), (2) (emphasis added). Section 601 does not distinguish between existing providers and (to use the language of Section 621(a)(1)) "additional competitive franchises." Consistent with the universal nature of these purposes, the Commission must provide equal regulatory treatment for all providers.

Customers of both existing operators and new entrants should get the benefit of any attempt by the Commission to reduce unnecessary regulatory burdens and to clarify ambiguities in the law over which the Commission may speak. Minimizing disparities in the franchising requirements applicable to new and existing cable operators, particularly those related to franchise fees, PEG and I-Net support and "mixed-use" networks, will "further[] the [Commission's] goal of developing a consistent regulatory framework across platforms by

---

[19] *Id.* at ¶ 140.

regulating like services in a similar functional manner ….”[20] Commissioner McDowell recognized this when he said a perfect version of the Commission’s Order “would say that all of the de-regulatory benefits we are providing to new entrants we are also providing to *all* video providers, be they incumbent cable providers, over-builders or others.”[21]

A. The Commission’s Clarifications with Respect to the Definition and Calculation of Franchise Fees Apply Equally to Existing Operators

In laying the factual predicate for taking action with respect to franchise fees, the *Report and Order* made clear that the “solution” to the franchise fee issues cited by new entrants lies with Section 622(b), the Act’s franchise fee provision, and not Section 621(a)(1). In this regard, the Commission stated: “Fee issues include not only which franchise-related costs imposed on providers should be included within the 5 percent statutory franchise fee cap *established in Section 622(b)*, but also the proper calculation of franchise fees (*i.e.*, the revenue base from which the 5 percent is calculated).”[22]

The Commission then proceeded to provide “guidance” in a number of areas with respect to franchise fees. In the course of doing so, the Commission observed that “[t]he general law with respect to franchise fees should be relatively well known, but we believe it may be helpful to *restate the basic propositions here* in [an] effort to avoid misunderstandings that can lead to delays in the franchising process as well as unreasonable refusals to award competitive franchises.”[23] Thus the Commission conceded that it was essentially restating (or at most clarifying) existing law with respect to franchise fees. Indeed, the discussion that followed

---

[20] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853 (2005).

[21] *Report and Order*, Separate Statement of Commissioner Robert M. McDowell at 2.

[22] *Id.* at ¶44 (emphasis added). *See also id.* at ¶ 94 (identical formulation of fee issue).

[23] *Id.* at ¶ 94 (emphasis added).

discussed and interpreted Section 622's franchise fee definition – a definition applicable to all cable operators.

Nevertheless, after acknowledging that it was merely restating existing law under a statutory provision applicable to *all* cable operators, the Commission inexplicably concluded that any such restatement of the law was only a "tentative conclusion" so far as existing cable operators are concerned and should be the subject of the *Further Notice*. Moreover, it said that "[t]o the extent that our determinations are relevant to incumbent cable operators as well, we would expect that discrepancies would be addressed at the next franchise renewal period …."[24] As we discuss below, the Commission's franchise fee determinations are "relevant" to existing cable operators and, as a restatement of existing law or, at most, new interpretations of the statute, such determinations apply immediately to them.

1. The Commission's Franchise Fee Clarifications

The Commission makes four essential determinations with respect to franchise fees, each time making clear that it is restating or clarifying existing law under the franchise fee provisions – not Section 621(a)(1) – of the Act.

First, with respect to the franchise fee revenue base, the Commission stated that "it may assist the franchise process and prevent unreasonable refusals to award competitive franchises *to reiterate certain conclusions that have been reached with respect to the franchise fee base*."[25] It then proceeded to "clarify" that, *under Section 622(b)*, "a cable operator is not required to pay franchise fees on revenues from non-cable services."[26] Rather, the five percent franchise fee cap

---

[24] *Id.*

[25] *Id.* at ¶ 97 (emphasis added).

[26] *Id.* at ¶ 98.

is applied to gross revenues derived from the provision of "cable service." The Commission observed that revenues from cable modem service and other sources that have nothing to do with cable service are not to be included in the revenue base on which the 5% fee is calculated.[27] This was a clear restatement of existing law applicable to all cable operators. Indeed, it is instructive that the Commission cited the *Cable Modem Declaratory Ruling* in support of this conclusion. In that decision, the FCC concluded that cable modem service was not a "cable service" and therefore revenues from cable modem service was not included in the cable franchise fee revenue base.[28] That decision took effect immediately upon the effective date of that Order since it clarified what fees were included in the franchise fee revenue base. A similar result would apply here to the FCC's fee determinations.

Second, the Commission addressed charges "incidental" to the awarding or enforcing of a franchise. In so doing, it observed that *Section 622(g)(2)(D)*[29] of the Act provides that such "incidental" charges are not to be deemed "franchise fees" subject to the Act.[30] The Commission noted that the statute further defines such charges to include "payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[31] According to the Commission, some franchising authorities have taken the view that the range of "incidental" fees associated with the franchise process goes far beyond these enumerated charges. Therefore, a number of parties sought Commission "*clarification* that certain types of

---

[27] *Id.*

[28] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4851 (2002), *rev'd, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd, NCTA v. Brand X*, 545 U.S. 967 (2005).

[29] 47 U.S.C. § 542(g)(2)(D).

[30] *Report and Order* at ¶ 99.

[31] *Id.*

payments being requested in the franchise process are not incidental fees under Section 622(g)(2)(D) …."[32]

In the *Report and Order*, the Commission clarified that the term "incidental" should apply only to the charges enumerated in the statute and certain minor additional expenses,[33] and that "non-incidental franchise-related costs required by LFAs must count toward the 5 percent franchise fee cap …."[34] In particular, interpreting Section 622(g)(2)(D), the Commission rejected the contentions that the following charges are "incidental," and held that they are franchise fees, subject to the five percent cap:

1) Attorneys' fees;
2) Consultant fees;
3) Application or processing fees that exceed the reasonable cost of processing the application;
4) Acceptance fees;
5) Free or discounted services provided to an LFA; and
6) Any requirement to lease or purchase equipment from an LFA at prices higher than market value.[35]

In so holding, the Commission made clear that it again was interpreting the statutory *franchise fee* provision – a provision that applies to all cable operators. The Commission's analysis began by noting that "[t]*here is nothing in the text of the statute or the legislative history to suggest that Congress intended the list of exceptions in Section 622(g)(2)(D) to include the myriad additional expenses that some LFA's argue are 'incidental.'*"[36] It then proceeded to

[32] *Id.* (emphasis added).

[33] *Id.* at ¶¶ 103-104.

[34] *Id.* at ¶ 99.

[35] *Id.* at ¶ 104.

[36] *Id.* at ¶ 103 (emphasis added).

conclude that "*the term 'incidental' in Section 622(g)(2)(D) should be limited to the list of incidentals in the statutory provision*, as well as some minor expenses….[37] In so concluding, the Commission cited a number of court decisions "relating to this subsection of Section 622,"[38] and found them "instructive" as to the meaning of that franchise fee provision. Indeed, the Commission observed that "[f]or future guidance, LFAs and video service providers may look to judicial cases to determine other costs that should be considered 'incidental.'"[39] Finally, in response to a challenge that it could not "rewrite the meaning of [Section 622(g)(2)(D)]," the Commission asserted that "we are within our Congressionally mandated authority to provide *clarifying guidance regarding the meaning of this provision*."[40]

In sum, as with its "clarification" of what constitutes the franchise fee revenue base, here too with respect to what constitutes "incidental" charges not subject to the five percent cap, the Commission itself made plain that it was either restating existing law or clarifying the meaning of Section 622's provisions. Such a clarification applies immediately to all cable operators subject to those provisions.

Third, with respect to in-kind payments, the Commission twice said it was "*clarif[ying]* that any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap."[41] As the *Report and Order* makes clear, this clarification has nothing to do with the particular circumstances of new entrants, but is based on the statutory definition of what is or is not a franchise fee for purposes

---

[37] *Id.* (emphasis added).

[38] *Id.*

[39] *Id.* at ¶ 104.

[40] *Id.* at n.344 (emphasis added).

[41] *Id.* at ¶ 105 (emphasis added). *See also id.* at ¶ 108 (same).

of Section 622. For example, the Commission observed that "[m]unicipal projects unrelated to the provision of cable service *do not fall within any of the exempted categories in Section 622(g)(2) of the Act* and thus should be considered a 'franchise fee' *under Section 622(g)(1)*."[42] As the Commission explained: "The legislative history of the 1984 Cable Act supports this finding, providing that 'lump sum grants not related to PEG access for municipal programs such as libraries, recreation departments, detention centers or other payments not related to PEG access would be subject to the 5 percent limitation.'"[43] It goes without saying that the legislative history the Commission cited pertained to the franchise fee provision, not Section 621(a)(1).

Fourth, in the context of discussing permissible franchise fees under Section 622, the *Report and Order* addressed "the proper treatment of LFA-mandated contributions in support of PEG services and equipment."[44] The Commission noted that "*Section 622(g)(2)(C) excludes from the term 'franchise fee'* any 'capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities,'"[45] and concluded that "payments of this type, if collected only for the cost of building PEG facilities, are not subject to the 5 percent limit."[46] It explained that capital costs refer to those costs incurred in or associated with the construction of PEG access facilities and that these costs are distinct from payments in support of the use of PEG access facilities, which include, but are not limited to, salaries and training. The Commission concluded that payments made in support of PEG access facilities are considered franchise fees and are subject to the 5 percent cap.[47] As with the other

[42] *Id.* at ¶ 108 (emphasis added).

[43] *Id. citing* H.R. Rep. No. 98-334, at 65 (1984), *as reprinted in* 1984 U.S.C. C.A.N. 4655, 4702.

[44] *Id.* at ¶ 109.

[45] *Id. citing* 47 U.S.C. § 542(g)(2)(C).

[46] *Id.* (emphasis added).

[47] *Id.*

franchise fee issues, each of these conclusions was based on the Commission's interpretation of Section 622 of the Act, not Section 621(a)(1).

2. The Franchise Fee Clarifications Merely Interpret Existing Law and Are Applicable to All Cable Operators

As noted above, in reaching each of these conclusions, the Commission made clear that it was restating (or clarifying) the law under Section 622 of the Act – a provision applicable to all cable operators. Indeed, the Commission started its legal analysis with the statement that "[t]he fundamental franchise fee limitation is set forth in Section 622(b)" and then proceeded to cite Sections 622(g)(1), 622(g)(2)(C), and 622(g)(2)(D), as predicates for its analysis of the franchise fee issues raised in the proceeding.[48] As is plain from their face, these franchise fee provisions contain no distinction between existing and new cable operators, nor has the Commission previously drawn such a distinction. Indeed, to the contrary, it has emphasized its role as assuring uniformity in franchise fee decisions.

As the Commission states in the *Report and Order*, its "jurisdiction over franchise fee policy is well established."[49] It notes that the D.C. Circuit concluded that "the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees lies with the [FCC]."[50] In 1986, the Commission concluded that its jurisdiction over fee disputes was concurrent with that of the judiciary and that it would maintain its authority on cases that impinge "on a national policy concerning cable communications."[51] This authority was sustained on appeal, with the D.C. Circuit Court of Appeals noting that the FCC has

---

48 *Id.* at ¶ 96.

49 *Id.* at ¶ 94.

50 *Id.* at n. 318, citing *ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987).

51 *Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 104 FCC 2d 386 (1986), *aff'd*, ACLU v. FCC, 823 F.2d 1554, 1574 (D.C. Cir. 1987).

responsibility to monitor court decisions and assert jurisdiction if inconsistent rulings threaten the congressional goal of uniformity.[52] The D.C. Circuit upheld the Commission's assertion of authority precisely because it meant that "the Commission has *not totally abdicated its ultimate responsibility* for enforcing the franchise fee provision."[53] Abdication of that responsibility, the court found, would have been inconsistent with Congress's determination to establish a *national policy* concerning cable communications that included a federal standard to govern franchise fees.

The essence of a uniform regulatory regime is that, in the absence of an express Congressional intent to the contrary, regulations must be applied consistently to all members of the class of entities that are subject to that regime.[54] Section 622 in particular applies to all cable operators providing cable service over a cable system, and makes no distinction between new and existing cable operators.

It is entirely appropriate for the FCC to provide guidance as to the meaning of Section 622. Issues regarding inclusions and exclusions from proposed fees can be raised in court as well. But there is no authority under Section 621 or elsewhere to create a two-tier approach to franchise fee definitions. In particular, Section 621, with its focus on judicial review of unreasonable refusals to award a competitive franchise, provides no authority for the Commission to interpret Section 622(g) *non-uniformly*, a result utterly at odds with the FCC's self-identified mission in the franchise fee area.

---

52 *ACLU v. FCC*, 823 F.2d at 1574.

53 *Id.* (emphasis in original).

54 *See Pennzoil Co. v. FERC*, 645 F.2d 360, 384 (5th Cir. 1981) (noting "unfairness in applying two different, conflicting standards to the same conduct" and endorsing "not uniformity of result . . . but instead uniformity of applicable law"); *Natural Res. Def. Council, Inc. v. EPA*, 537 F.2d 642, 646 (2d Cir. 1976) (Congressional goal of uniformity means that Congress intends uniform treatment for plants that are similarly situated).

Indeed, the basis for the Commission's franchise fee determinations could not be something other than Section 622 or the proposal would violate Section 622(i), which prohibits federal agencies from regulating "the amount of franchise fees paid by a cable operator . . . except as provided in [Section 622]."[55] Accordingly, the Commission's conclusions with respect to the definition and calculation of franchise fees can, and must, apply to all cable operators and are applicable immediately.

B. PEG/I-Nets

In addressing "unreasonable" PEG and I-Net requirements, the Commission purports to act pursuant to Section 621. In fact, it is restating or interpreting the statutory PEG and I-Net requirements in Section 611 of the Act.[56]

While the Commission claims that its "finding is limited to competitive applicants under Section 621(a)(1),"[57] its conclusions with respect to PEG and I-Net requirements are at bottom based on its reading of provisions of the Act, particularly Section 611(a), which apply to all cable operators. Indeed, the Commission begins its analysis of PEG and I-Net issues by noting that "Section 611(a) of the Communications Act operates as a restriction on the authority of the franchising authority to establish channel capacity requirements for PEG."[58]

---

[55] 47 U.S.C. § 543(i).

[56] In this regard, the *Report and Order* states: "[P]ursuant to Section 621(a)(1), we conclude that LFAs may not make unreasonable demands of competitive applicants for PEG and I-Net and that conditioning the award of a competitive franchise on applicants agreeing to such unreasonable demands constitutes an unreasonable refusal to award a franchise." *Id.* at ¶ 110.

[57] *Id.* The Commission concedes that "this issue is also germane to existing franchisees," but defers until the *Further Notice* the question of the applicability of its findings to existing cable operators. *Id.*

[58] *Id.* at ¶ 112.

As noted above, the *Report and Order* clarifies that LFAs are free to establish their own requirements for PEG support, but the non-capital costs must be offset from the operator's franchise fee payments. The *Report and Order* also holds that it is unreasonable to insist on PEG support from new franchisees that *exceeds* the incumbent operator's obligations and that it would be *per se* reasonable to require the new entrant to share the costs of the incumbent's PEG obligations on a *pro rata* basis, based on the number of subscribers.[59]

The *Report and Order* also concludes that an I-Net requirement is not duplicative if it provides additional capability or functionality beyond what is provided by existing facilities.[60] But it also suggests that, even where this is the case, it may be unreasonable to require construction of new I-Net facilities where the new franchisee can instead provide financial support or additional equipment to supplement the existing franchisee's facilities.[61] Also, the *Report and Order* says that it would be unreasonable to insist that, in lieu of constructing an unnecessary I-Net, the new franchisee pay the face value of such an I-Net to the franchising authority.[62]

The *Report and Order* contends that the Commission can reach these conclusions by interpreting what is meant by the term "adequate [PEG] channel capacity, facilities and financial support" in Section 621(a)(4)(b).[63] Even assuming that is correct, that section of the Act applies to *all* franchise holders. To the extent the Commission reached conclusions on what constitutes

---

59 *Id.* at ¶ 120. According to the *Report and Order*, the "pro rata" cost is to be calculated based on the existing operator's per subscriber payment at the time of the new entrant's application, as applied to the new entrant's subscriber base. The use of the terms "sharing" and "pro rata" strongly suggest that the existing operator's support payments should decrease if it loses market share. *Id.* at n.396.

60 *Id.* at ¶ 119.

61 *Id.*

62 *Id.*

63 *Id.* at ¶ 112.

"adequate" PEG requirements under that section, and particularly to the extent those determinations would otherwise result in lesser I-Net obligations for new entrants, such conclusions must apply to existing operators as well. In any event, those conclusions as to what PEG or I-Net requirements are "reasonable" obviously and most directly interpret Section 611(a) requirements which apply to all cable operators.

C. Mixed-Use Networks

Finally, the *Report & Order* addresses the treatment of "mixed use" networks. In that regard, the Commission states "we *clarify* that that LFAs' jurisdiction applies only to the provision of cable services over cable systems."[64] In conclusions equally applicable to existing cable operators as well as new entrants, the Commission says that "an LFA has no authority to insist on an entity obtaining a separate cable franchise in order to upgrade non-cable facilities;"[65] that it is "unreasonable" for a franchising authority to refuse to grant a cable franchise based on issues related to non-cable services or facilities;[66] and that local governments may not use their cable franchising authority to attempt to regulate services other than cable service, whether by franchising agreement or by regulation.[67] These are unexceptional conclusions based on existing law, not on Section 621(a)(1), and that apply to all cable operators. As the Commission concludes:

> Local regulations that attempt to regulate any non-cable services offered by video providers are preempted because such regulation is beyond the scope of local franchising authority and is inconsistent with the definition of "cable system" in Section 602(7)(C).[68]

---

64 *Id.* at ¶ 121 (emphasis added).

65 *Id.*

66 *Id*. at ¶ 122.

67 *Id.*

68 *Id*. at ¶ 122. Section 602(7)(C) provides that a common carrier facility subject to Title II is considered a cable system "to the extent such facility is used in the transmission of video programming."

In reaching these conclusions, the Commission deems certain practices "unreasonable" in an obvious effort to cinch its conclusions to the language of Section 621(a)(1). However, those conclusions restate existing law or clarify provisions that make no distinction between existing and new cable operators. As such, to the extent relevant, the Commission's conclusions as to "mixed-use" facilities are applicable to existing cable operators as well as new entrants and apply immediately.

CONCLUSION

In each of the areas discussed above (franchise fee issues, PEG/I-Net requirements, mixed-use facilities), the Commission can and indeed – by operation of law – must, afford identical relief for existing cable operators who operate under the same statutory provisions that the Commission was clarifying for new entrants. And that relief is applicable, not just at the time of the operator's next renewal as the Commission tentatively concludes, but immediately.[69] As noted above, its conclusions with respect to franchise fees, PEG/I-Net requirements and mixed-use facilities are based on restatements of existing law or clarifications of statutory provisions applicable to existing operators and new entrants alike, not on Section 621(a)(1), even assuming the Commission had authority to act under that section (which it does not).

As we said in our comments in this proceeding: "It may be that some franchise requirements unreasonably restrict the ability of cable operators, both existing and incipient, to

[69] The Commission also sought comment on "what effect, if any, the findings in this *Order* have on most favored nation clauses that may be included in existing franchises." *Id*. at ¶ 140. While MFN provisions will differ from franchise to franchise, the short answer to the Commission's inquiry is that any relief provided to new entrants must be made available to existing operators under most favored nation clauses. Consistent with the Commission's purpose in reducing unnecessary regulatory burdens, existing cable operators must have the benefit of MFN provisions if new entrants are able to obtain franchises under more favorable terms than the existing operator's franchise.

offer competitive services and facilities that best meet the marketplace demand of consumers. But if this is the case, the remedy is to remove such restrictions from *all* franchisees – not simply to exempt new entrants."[70] The Commission recognized as much in the *Further Notice* when it concluded that "we believe that *the interest of fairness to those [existing] cable operators* would outweigh any impact on small [LFAs]. *The alternative (*i.e., *continuing to allow LFAs to follow procedures that are unreasonable) would be unacceptable, as it would be inconsistent with the Communications Act.*"[71]

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner
Neal M. Goldberg
National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

April 20, 2007

[70] NCTA Comments at 4.

[71] *Report and Order*, Appendix C, Initial Regulatory Flexibility Analysis, at ¶ 16 (emphasis added).